Supreme Court, U.S.
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No. 95-1181

In The

Supreme Court of the United States

October Term, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent,

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR THE PETITIONERS

GARY D. STUMPP
Counsel of Record
ADAM M. BOND
STUMPP & BOND, LLP
61 Broadway, Suite 2216
New York, NY 10006
(212) 968-8600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the "Treasury Amendment" to the Commodity Exchange Act ("CEA"), 7 U.S.C. § 2(ii) – which provides in pertinent part that "Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade" – exempts off-exchange foreign currency options from CEA regulation.

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JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A timely petition for rehearing and a suggestion for rehearing en banc was denied on August 4, 1995. Pet. App. 1c-2c. On December 12, 1995, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including January 23, 1996. A timely petition for a writ of certiorari was filed on January 23, 1996 and granted on May 28, 1996. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The "Treasury Amendment" to the Commodity Exchange Act, 7 U.S.C. § 2(ii), provides in full as follows:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

STATEMENT

A. Background

Petitioner William C. Dunn is the President of Petitioner Delta Consultants, Inc., which served as an advisor to certain investment companies (including respondent Delta Options, Ltd. – "Options"),[1] for off-exchange foreign currency transactions, including options. JA 6-7. During 1993, Options had customer investments of approximately $180 million; in November of 1993, it advised investors that it had sustained trading losses of approximately $95 million. JA 8.

The foreign currency options transactions engaged in by Petitioners – with such major banks as Credit Lyonnais, Bank Julius Baer & Co. Ltd., Societe Generale, and The Chase Manhattan Bank, N.A. – were not executed on any "exchange" or "board of trade." Instead, they were part of an established, international, off-exchange, interbank market, where trades are entered into individually between the participants – with different specifications and duration. Such off-exchange foreign currency options transactions are normally made on a daily basis for institutional foreign currency banks, dealers, and speculators – and are different from the standardized foreign currency contracts traded on exchanges (and regulated by the CFTC).[2] On any given day, hundreds of billions of

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[1] Respondent Nopkine Co., Ltd. has not appeared in this action; Options is in liquidation in the Bahamas.

[2] *See* Amicus Curiae Brief in Support of The Petition for a Writ of Certiorari of the Foreign Exchange Committee, the New York Clearing House Association, the Futures Industry Association, the Managed Futures Association, and the Public

dollars' worth of currency are bought and sold, and trillions of dollars' worth of foreign exchange contracts are outstanding. *See* Amicus Curiae Brief of the Foreign Exchange Committee and the New York Clearing House Association, *CFTC v. Dunn* (2d Cir. No. 94-6197) at 5-6. Foreign currency options, in particular, are essential to enable businesses and governments to hedge against the risk of adverse exchange rate movements. *Id.* at 4-6.

B. The Commodity Exchange Act and the Treasury Amendment Thereto

The Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 *et seq.*, establishes a comprehensive system for regulating commodity futures and options contracts.[3] However, it does not regulate either "spot" transactions (in which the

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Securities Association (U.S.S.C. No. 95-1181) at 4-5 (noting that such trading has been occurring for years "with the understanding that [these] activities were excluded from regulation by the [CFTC] under the [CEA]"), and *id.* at 7-8 (noting the "global significance of these markets" and that the " 'great bulk' of options in foreign currency are traded in OTC markets, while exchange-traded foreign currency options constitute a 'small part' of the total.")

[3] A futures contract is an agreement to make or take delivery of a specific amount of a commodity at an agreed-upon price, on a specified future date. John Downes & Jordan Elliot Goodman, *Dictionary of Finance & Investment Terms* at 168 (Barron's Financial Guides, 3d ed. 1993); *Options, Essential Concepts and Trading Strategies* at 385 (The Options Institute 1990). An option is an agreement that gives the purchaser the right, but not the obligation, to purchase (a "call" option) or to sell (a "put" option) a specified amount of a commodity, at an agreed-upon price, on or before a specified future date. Downes & Goodman, *supra*, at 297-98; *Options*, *supra*, at 389.

commodity is delivered at or near the time of sale), or "forward" transactions (in which one party purchases a commodity, but delivery is deferred).[4] 7 U.S.C. § 2.

In 1974, Congress substantially amended the CEA, and *inter alia*, "created an independent agency, the CFTC, and entrusted to it sweeping authority to implement the CEA." *CFTC v. Schor*, 478 U.S. 833, 836 (1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 366 (1982). Additionally, these amendments substantially broadened the scope of the "commodity" contracts that were subject to regulation. Whereas the CEA previously had governed only futures and options in certain agricultural products, these amendments expanded its coverage. Thus, a "commodity" was broadly defined in 7 U.S.C. § 1(a)(3), as including "all other goods and articles, except onions . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in," and 7 U.S.C. § 2(i), provided for broad CFTC authority:

> The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option," . . .) and transactions involving contracts of sale of a commodity for future

[4] Both "spot" and "forward" transactions are made in the interbank market. "Spot transactions are usually settled within two business days. Forwards are usually quoted for one, two, three, six, and twelve months." *Report on Exchanges of Futures for Physicals* (CFTC Division of Trading & Markets, Oct. 1, 1987) (the "CFTC EFP Report") at 124.

> delivery, traded or executed on a contract market designated pursuant to section 5 of this Act or any other board of trade, exchange, or market. . . .

However, the "Treasury Amendment" – also enacted in 1974 as the immediately following subsection, 7 U.S.C. § 2(ii) – provides an express exemption from CEA regulation over off-exchange "transactions in foreign currency":

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

This exemption expressly excludes from CEA regulation all "transactions in foreign currency" where trading is not conducted on a "board of trade" (or "exchange").[5]

C. Proceedings in the District Court

On April 5, 1994, the CFTC brought this action alleging that all defendants, including Petitioners, violated the CEA by utilizing customer investments to enter into off-exchange foreign currency options with banks in New

[5] The Solicitor General has conceded that the options here were traded "outside of an organized exchange." Solicitor General's Brief In Opposition To Petition For A Writ Of Certiorari ("Solicitor General Opp.") at (I); *id.* at 11-12. Thus, the exception within the Treasury Amendment for transactions conducted "on a board of trade" (or "exchange") – which was intended to apply to trading "conducted on a formally organized futures exchange" S. Rep. 1131, 93d Cong., 2d Sess. 23 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 5843, 5863 – is not at issue in this case.

York City.[6] JA 8. The Complaint alleged that Petitioners' off-exchange foreign currency options transactions were made contrary to regulations of the CFTC, in violation of 7 U.S.C. § 6c(b). JA 10-14. As relief, the complaint sought, *inter alia*, the appointment of a temporary equity receiver. JA 17.

Petitioners argued that the Treasury Amendment exempted their off-exchange transactions in foreign currency options from CEA regulation, and thus the district court was without subject matter jurisdiction. On June 23, 1994, the district court rejected Petitioners' contention and appointed a temporary equity receiver, Pet. App. 1b-4b, supporting such action in a July 1, 1994 memorandum opinion citing the Second Circuit's decision in *CFTC v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986). Pet. App. 6b.

D. Proceedings in the Court of Appeals

Pursuant to 28 U.S.C. § 1292(a)(2), Petitioners filed an interlocutory appeal from the order appointing a receiver. In an opinion dated June 23, 1995, the Second Circuit affirmed the district court's ruling – although the panel did not independently analyze whether the Treasury Amendment exempts off-exchange foreign currency

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[6] To the extent that individuals invested with Petitioners (and have filed civil lawsuits in the Southern District of New York to recover their losses), they did not enter into options or futures contracts. However, the CFTC purported to assert jurisdiction based upon Petitioners' use of the invested funds to enter into the off-exchange options contracts with banks in New York City. JA 5-6.

options from CEA regulation. Pet. App. 1a-7a. Instead, it held that it was "foreclosed by clear precedent in this circuit that holds that the term 'transaction in foreign currency' does not include options, even those options traded *off*-exchange" (*id.*, 6a) – citing the *American Board of Trade* decision by a prior panel.

There, in a case involving *exchange* trading,[7] the Second Circuit held that an option did not become a "transaction in foreign currency" until it was exercised and currency actually was exchanged. 803 F.2d at 1248-49. Nevertheless, the decision below declined to treat the construction of "transactions in foreign currency" in *American Board of Trade* as *dicta*. Although acknowledging that the prior panel's reasoning may have been "broader than necessary," the court below held that it had no authority to reconsider its *ratio decidendi*, noting:

> Whatever doubts this panel may have about the interpretation given the Treasury Amendment in *American Board of Trade*, therefore, are not grounds for our declining to follow it.

Pet. App. 6a.

The panel below correctly acknowledged that its interpretation of the Treasury Amendment conflicted with that of the Fourth Circuit in *Salomon Forex, Inc. v.*

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[7] The defendant in *American Board of Trade* was specifically described by the Second Circuit as "an organization that provided, *inter alia*, an exchange or market place for certain commodity options transactions." 803 F.2d at 1244. Thus, the Treasury Amendment exemption was not applicable – as that exemption is qualified by the phrase "unless such transactions involve the sale thereof for future delivery conducted on a board of trade."

Tauber, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994), stating: "This conflict is for the Supreme Court, not us, to resolve." Pet. App. 6a.

SUMMARY OF ARGUMENT

1. The plain meaning of the Treasury Amendment excludes all off-exchange foreign currency transactions – including options – from regulation under the CEA. "Transaction" is an extremely broad word that encompasses a wide variety of commercial arrangements, including options. Indeed, Congress used the word "transaction" to describe options when delineating the jurisdiction of the CFTC in the same section of the CEA that contains the Treasury Amendment. Having understood "transaction" to include options in the context of establishing the CFTC's jurisdiction, Congress could not have intended a different meaning when creating an exception to that jurisdiction. Since the Treasury Amendment exempts from CEA regulation "transactions in foreign currency" that are not "conducted on a board of trade," such options that are not traded on a "board of trade" (*i.e.* off-exchange options) are not subject to regulation under the CEA.

The Second Circuit's construction of the Treasury Amendment to include only foreign currency options which are exercised, is untenable. First, as previously argued by the United States, it is based on an erroneous interpretation of the Treasury Amendment and is inconsistent with its statutory purpose. Additionally, it is illogical, contradicts economic reality, and would lead to the

unreasonable result where the legality of millions of dollars of options trades would hinge on subsequent and unpredictable market forces; Congress could not have intended to inject such uncertainty into the CEA's regulatory scheme.

2. The Congressional purpose in enacting the Treasury Amendment was to exclude *all* "transactions in foreign currency" from CEA regulation. Congress enacted the Treasury Amendment at the specific request of the Treasury Department, which had expressed concern that proposed expansion of the CFTC's jurisdiction would interfere with the significant and efficient off-exchange foreign currency market. As outlined in a letter from the Treasury Department to Congress, it was concerned with the potentially adverse effects CFTC jurisdiction could have on the trillion dollar off-exchange foreign currency market used by banks, international businesses, and professional traders to hedge against foreign currency risks. Off-exchange foreign currency options fall squarely within the market sector sought to be protected. Accordingly, the decision below subjecting such transactions to CEA regulation is inconsistent not only with the statute's express language, but also with its specific congressional intent.

3. Where, as here, the language and congressional purpose of a statute are clear, resort to agency interpretation is unnecessary. However, the Treasury Department – whose concerns the Treasury Amendment was specifically adopted to address – consistently has stated that off-exchange foreign currency options are not subject to regulation under the CEA.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE TREASURY AMENDMENT PRECLUDES CEA REGULATION OVER ALL OFF-EXCHANGE FOREIGN CURRENCY TRANSACTIONS – INCLUDING OPTIONS

This Court has emphasized that the principal basis (and frequently the only one) for construing the meaning of a statute "is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *accord Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (plain language "must ordinarily be regarded as conclusive"); *Rake v. Wade*, 508 U.S. 464, 471 (1993) (where a statute is clear, the court's "sole function . . . is to enforce it according to its terms," quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it").

Here, the plain language of the words "transactions in foreign currency" means any commercial dealings involving foreign currency. The term "transaction" is extremely broad, and normally applies to a wide range of commercial dealings and arrangements. *See Webster's Third New International Dictionary of the English Language* at 2425-26 (1996) (defining "transaction" as "a communicative action or activity involving two parties or two things reciprocally affecting or influencing each other"); *Black's Law Dictionary* at 1496 (6th ed. 1990) (defining "transaction" as an "[a]ct of transacting or conducting

any business" and "embrac[ing] every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons").[8]

Thus, the plain meaning of the Treasury Amendment excludes from the CEA *all* off-exchange "transactions in foreign currency," including options. The purchase or sale of an off-exchange foreign currency option is itself a "transaction," which provides the holder the right to purchase or sell foreign currency. Such a transaction is a "transaction in foreign currency" because its subject matter is foreign currency. There was no need to separately deal with "options," as they were part of the generally excluded "transactions in foreign currency."

The decision below attempted to carve foreign currency *options* out of the universe of foreign currency *transactions* generally – by following the reasoning of *American Board of Trade* that the "transactions in" language of the Treasury Amendment does not include foreign currency options, Pet. App. 5a-6a. Although the court below expressed doubts as to that reasoning, Pet. App. at 6a – which, in turn, relied on *Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) – it adopted the conclusion of those decisions, and held "an option [is] simply the right

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[8] Additionally, the preposition "in" means "involving" or "concerning"; it commonly is used to denote inclusion with relation to a group as a whole. *See Webster's, supra*, at 1139 (defining "in" "as a function word to indicate," among other things, "the fact of belonging to a group or association," "close connection by way of implication or active participation," and "engagement in a business identified with a particular commodity.")

to engage in a transaction in the future, and, until this right mature[s], there [is] no exempt 'transaction.' " Pet. App. 6a. *See American Board of Trade*, 803 F.2d at 1248 (an option "does not become a 'transaction[ ] in' that currency unless and until the option is exercised"); *Chicago Board of Trade*, 677 F.2d at 1154 ("[o]nly when the option holder exercises the option is there a transaction in a government security").[9] That conclusion is flawed for three main reasons.

1. The purchase or sale of a foreign currency option – not just the exercise of that option – is a "transaction" in foreign currency within the meaning of the Treasury Amendment. That interpretation of "transaction" is consistent with the broad usage of transaction elsewhere in the CEA, where it also refers to options. In fact, in the *same section* of the CEA that includes the Treasury Amendment, the term "transaction" is used to refer to options and other related arrangements:

> The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements (including any *transaction* which is of the character of, or is commonly known to the trade as, an "*option*", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and *transactions* involving contracts of sale of a commodity for future delivery. . . .

7 U.S.C. § 2(i) (emphasis added) Moreover, the same words are "used elsewhere in the [CEA] to mean all

[9] *Chicago Board of Trade* involved a jurisdictional dispute between the CFTC and SEC as to which agency had authority over organized *exchange* trading in options on GNMA securities.

transactions *involving* the commodity." *Salomon Forex*, 8 F.3d at 976 (citing 7 U.S.C. § 5: "*Transactions in commodities* involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest").

"Presumptively, 'identical words used in different parts of the same act are intended to have the same meaning.' " *United States Nat'l Bank v. Independent Ins. Agents*, 508 U.S. 439, 460 (1993) (quoting *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993)). That presumption is even stronger here in view of Congress' use of the same word in the *same* part of the statute. Having understood "transaction" to include options in the context of establishing the CFTC's jurisdiction under the CEA, Congress hardly could have intended a contrary meaning in the Treasury Amendment – which creates an exception to that jurisdiction. Since the Treasury Amendment exempts from CEA regulation "transactions in foreign currency" (except those "conducted on a board of trade"), off-exchange foreign currency options are not regulated by the CEA.

2. Moreover, reading "transactions in foreign currency" to exclude options would create a distinction between off-exchange "futures" (which would be exempt from CEA regulation by the Treasury Amendment)[10] and

[10] The phrase "transactions in foreign currency" must be read to include future interests in order to give meaning to the qualifying clause "unless such transactions involve the sale thereof for future delivery conducted on a board of trade." *See Salomon Forex*, 8 F.3d at 975.

"options" (which would not be exempt). Such a distinction is completely illogical. Both futures and options hedge and/or shift risk, and "it is almost always possible to devise an option with the same economic attributes as a futures contract (and the reverse)." *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, 543 (7th Cir. 1989), *reh'g denied en banc*, U.S. App. LEXIS 16280, *cert. denied*, 496 U.S. 936 (1990). "Since trading in both futures and options involves foreign currency, albeit indirectly, there is no principled reason to distinguish between them in this context." *Salomon Forex*, 8 F.3d at 976. Accordingly, there is no valid basis on which to differentiate options from other forms of "transactions in foreign currency" – all of which are excluded by the Treasury Amendment.

3. Furthermore, an interpretation of "transactions in foreign currency" as including only exercised options would create a situation where the legality of off-exchange option transactions in foreign currency would depend on whether subsequent market conditions – unknowable when the options are entered, as their value varies according to the price of the underlying currency – ultimately became favorable to their exercise.[11]

Since the decision as to when or whether to exercise any option is dependent on the profitability involved, future movements in the foreign currency market would

[11] "A purchaser will not exercise an option until the market price of the underlying is greater than the exercise price for a call option or less than the exercise price for a put option." United States General Accounting Office Report to Congressional Requesters, *Financial Derivatives: Actions Needed to Protect the Financial System*, p.27 (May 1994).

control the choice to exercise, and thus the legality of that "transaction in" foreign currency. Therefore, a construction of the phrase "transactions in foreign currency" that would limit its scope to exercised options would make application of the Treasury Amendment – and hence the legality of the transaction – wholly dependent upon unpredictable market forces; Congress could not have intended to inject such uncertainty into the CEA's regulatory scheme.[12] However, such unpredictability would be avoided by following the statutory language – which excludes *all* off-exchange "transactions in foreign currency" (including options).

Thus, the interpretation of the Treasury Amendment offered by the court below clearly would lead to an unreasonable result – since jurisdiction would be based on uncontrollable events in the future. Such a result would be contrary to what "has been called a golden rule of statutory interpretation" – namely "that unreasonableness of the result produced by" such an interpretation "is reason for rejecting that interpretation in favor of another which would produce a reasonable result." Sutherland, *Statutory Construction*, § 45.12 (5th ed. 1992). *See also Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

[12] Congress has recognized "the need to create legal certainty for a number of existing categories of instruments which trade today outside of the forum of a designated contract market." H. R. Rep. Conf. No. 978, 102d Cong., 2d Sess. at 80 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3103.

Accordingly, in light of the precise language of the Treasury Amendment, its exemption applies to *all* "transactions in foreign currency," including options. Petitioners were "engaged in off-exchange trading of the sort exempted from coverage of the CEA by the Treasury Amendment." *Salomon Forex*, 8 F.3d at 978. Where, as here, the words of the statute are clear, resort to legislative intent is unnecessary and irrelevant. *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 808-09 n.3 (1989); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991).[13]

II. THE PURPOSE OF CONGRESS IN ADOPTING THE TREASURY AMENDMENT WAS TO EXCLUDE ALL TRANSACTIONS IN FOREIGN CURRENCY

The Treasury Amendment was enacted in response to specific concerns raised by the Treasury Department that the proposed expansion of the CEA to include non-agricultural commodities, as well as the potential exercise of broad jurisdiction by the CFTC over foreign currency transactions, would adversely impact already existing off-exchange markets. As noted in the *CFTC EFP Report* at 125, "[t]here are several categories of participants in the

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[13] Nevertheless, a review of its congressional purpose supports Petitioners' contention that the Treasury Amendment was specifically intended to, and does exclude off-exchange foreign currency options from the reach of the CEA. Indeed, it was a specific congressional response to the precise concerns expressed by the Treasury Department that off-exchange foreign currency transactions (such as those engaged in by Petitioners) *not* be regulated under the CEA.

foreign exchange ('forex') market" – which include "fund managers and professional traders," such as Petitioners – as well as:

> *Central banks* (such as the Bank of England) use forex markets to manage their forex reserves, and also to adjust the value of their respective currencies through purchases or sales of their own or other currencies. *Bank and non-bank foreign exchange dealers* (including many FCMs) execute forex orders for their own accounts and sometimes also act as brokers for customers. . . . *Multinational corporations, domestic corporations, importers and exporters, and individuals* execute forex transactions to facilitate normal business transactions in which they must make payments in currencies other than their domestic currency. . . . As in all markets, *speculators* participate to profit from price changes. . . . *Arbitrageurs*, who profit by simultaneously buying and selling currencies to take advantage of price discrepancies, are particularly important participants in the forex market.

Id. at 121-22 (emphasis added).

The Treasury Department expressed its concerns as to the continued efficacy of the off-exchange foreign currency markets in a letter dated July 30, 1974, from its General Counsel to the Chairman of the Senate Committee on Agriculture and Forestry, stating in part:

> The Department believes the bills contain an ambiguity that should be clarified. The provisions of the bills do not clearly indicate that the new regulatory agency's authority would be limited to the regulation of futures trading on

> organized exchanges, and would not extend to futures trading in foreign currencies off organized exchanges . . . .
>
> The Department feels strongly that foreign currency futures trading, other than on organized exchanges, should not be regulated by the new agency. Virtually all futures trading in foreign currencies in the United States is carried out through an informal network of banks and dealers. This dealer market, which consists primarily of the large banks, has proved highly efficient in serving the needs of international business in hedging the risks that stem from foreign exchange rate movements.

S. Rep. No. 1131, 93d Cong., 2d Sess. 49-51 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 5887-88.[14]

The specific concerns expressed by the Treasury Department were that such regulatory restrictions, as well as the possible application of the CEA to off-exchange foreign currency transactions, would be "a serious defect in the proposed legislation that would, if enacted, impair the usefulness and efficiency of our foreign exchange markets." *Id.* at 5888. Accordingly, the letter "strongly urge[d] the Committee to amend the proposed legislation" to clarify "that its provisions would not be applicable to futures trading in foreign currencies

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[14] Risk hedging is one of the principal functions of foreign currency options. *See* CEA, Legislative Findings, 7 U.S.C. § 5 (options "may be utilized by commercial and other entities for risk shifting and other purposes"); W.H. Sutton, *Trading In Currency Options* (1988) at 17 (the "main purpose" of the off-exchange foreign currency market is "as a hedging medium").

or other financial transactions of the nature described above other than on organized exchanges." *Id.* at 5889.

The Treasury Department then proposed specific exclusionary language, which was enacted virtually verbatim in the Treasury Amendment. "This Treasury request and direct congressional response is revealing" (*Salomon Forex*, 8 F.3d at 976) – in its indication of congressional intent to accept the Treasury Department's suggestion that *all* foreign currency transactions conducted *off* organized exchanges be excluded from CEA coverage.

> The Commission will have exclusive jurisdiction over *options trading in commodities* (but not in securities). However, *transactions in foreign currency* . . . would not be subject to the Act unless they involve the sale thereof for future delivery conducted on a board of trade.

S. Rep. No. 1131, *reprinted in* 1974 U.S.C.C.A.N. at 5870 (emphasis added). *See also id.* at 5863 (where the Senate Agriculture and Forestry Committee stated that the Treasury Amendment was included "to clarify that the provisions of the bill are not applicable to trading in foreign currencies" except where "such trading is conducted on a formally organized futures exchange"); *Salomon Forex*, 8 F.3d at 976-77 (the concern leading to the adoption of the Treasury Amendment "was that the informal network of established dealers in foreign currency-based investments would otherwise be brought within the ambit of the CEA," and the Treasury Amendment "drew a distinction between the 'informal network of banks and dealers' intended to be excluded and 'the participants on organized exchanges.' ").

CEA regulation of the off-exchange foreign currency market would reduce efficiency, inhibit innovation in the development of new financial mechanisms, result in higher costs, and damage the United States' ability to compete in the world market. *See Salomon Forex*, 8 F.3d at 974 (citing arguments of *amici*). Additionally, regulation of the United States involvement in the foreign currency markets "would result in extra-ordinary costs and would damage the United States' ability to compete as a world financial center," and would "adversely affect the large and developing global market in foreign currency forwards and options in which the 1989 average daily turnover approximated $50 billion." *Id.* (citing Amicus Curiae Brief of Foreign Exchange Committee). In short, CEA regulation of this important market (as decided by the court below) could "disrupt the United States and worldwide foreign currency markets, sap liquidity from the markets, [and] drive trading offshore." *Id.* at 8.

Thus, in deference to these concerns, when the 1974 amendments to the CEA were enacted, all off-exchange foreign currency transactions (such as those engaged in by Petitioners) were specifically exempted from regulation under the CEA – except only those "for future delivery . . . conducted on boards of trade" (i.e., exchange trading, which was not engaged in by Petitioners, who instead traded exclusively in the off-exchange, interbank market).

III. THE TREASURY DEPARTMENT CONSISTENTLY HAS CONSTRUED OFF-EXCHANGE FOREIGN CURRENCY OPTIONS TRANSACTIONS TO BE WITHIN THE TREASURY AMENDMENT'S EXCLUSION FROM CEA REGULATION

As set forth above, both the plain language of the Treasury Amendment and its congressional purpose unambiguously establish an intent to exclude all off-exchange transactions in foreign currency – including options – from regulation under the CEA. Fundamental principles of statutory interpretation clearly indicate the primary significance of statutory language and congressional intent – despite any agency interpretation to the contrary. *See Federal Election Comm'n v. Democratic Senatorial Campaign Comm'n*, 454 U.S. 27, 32 (1981) (a court "must reject" agency interpretations "that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement"). As held in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 and n.9 (1984) (citations omitted):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.

See also Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982) (plain meaning of legislation is conclusive except in rare circumstances where literal application of a statute would lead to a result demonstratively at odds with congressional intent); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978) (agency interpretation cannot overcome "clear contrary indications in statute itself"); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973) (Court is not obligated to "rubber stamp" agency interpretations that are inconsistent with statutory mandate).

However, to the extent this Court determines that any agency interpretation of the Treasury Amendment is relevant, it should look to the long-standing views of the Treasury Department.[15] The Treasury Department (as well as the SEC) have asserted, consistent with Petitioners here, that the Treasury Amendment exempts off-exchange foreign currency options from regulation under the CEA. *See* Amicus Curiae Brief of the United States in *Salomon Forex v. Tauber*, No. 92-1406 (4th Cir. 1992), Pet.

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[15] The CFTC itself previously seems to have recognized the proper scope of the Treasury Amendment, when it cited the 1974 Senate Report to confirm that "regulation by the [CFTC] of transactions in the specified financial instruments . . . is unnecessary, *unless executed on a formally organized futures exchange.*" *SEC-CFTC Jurisdictional Correspondence*, [1975-77 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,117 (CFTC Staff Response, Dec. 3, 1975), at 20,834 n.13, emphasis added). Here, however, the CFTC continues its unsuccessful campaign (as in its *amicus* submission in *Salomon Forex*) to reinterpret the Treasury Amendment – since it is "pressing for greater regulation of transactions in foreign currencies." *Salomon Forex*, 8 F.3d at 974.

App. 10d; Solicitor General Opp. at 12-13. As explained by the United States in *Salomon Forex*:

> A smoothly functioning foreign currency market, with a wide range of participants, is essential to international trade and investment flows. However, a narrowed interpretation of the Treasury Amendment could put into question outstanding transactions, as well as inhibit risk-reducing improvements, such as clearing-house operations, in the foreign currency market. The Treasury, as the agency charged with managing the international financial policy of the United States, has an important interest in preventing the legal uncertainty a narrow interpretation of the Treasury Amendment would introduce into this enormous market, which is an essential component of the international economic system.

Pet. App. 10d.

Significantly, the United States previously has taken the position before this Court that the reasoning in *Chicago Board of Trade* – which underlies both *American Board of Trade* and the decision below – should be rejected.[16] *See*

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[16] The United States has not taken a position on the proper disposition of this case on the merits. The Solicitor General was not involved in the proceedings in the lower courts (since the CFTC has independent litigating authority there), nor did he express a view on the merits in his brief in opposition to granting the writ of certiorari. However, if the United States reverses the position stated in the petition for a writ of certiorari in *Chicago Board of Trade* and the amicus brief in *Salomon Forex*, then the position of the United States would not be entitled to deference. *See Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451

Amicus Curiae Brief of the United States in *Salomon Forex*, Pet. App. 23d:

> In petitioning the Supreme Court for review of the Seventh Circuit's decision, the Solicitor General asserted that the Court incorrectly interpreted the Treasury Amendment, stating that options on government securities were within the Amendment's "transactions in" language.

Furthermore, the United States also noted that *Chicago Board of Trade* and *American Board of Trade* "cannot be reconciled with the statutory purpose of the Amendment"; instead, "options on government securities were within the Amendment's 'transactions in' language." Pet. App. 22d-23d. Moreover, the United States in *Salomon Forex* acknowledged that the district court had "correctly interpreted the Treasury Amendment," by holding that the "transactions in foreign currency" reference in the Treasury Amendment "plainly and unambiguously means any transaction, without limitation as to the participants involved, in which foreign currency is the commodity or subject matter." Pet. App. 16d. Additionally, the United States pointed out that such an interpretation of CEA regulation would result in a situation where "market efficiency would be reduced and innovation in the development of new mechanisms would be inhibited,

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U.S. 259, 273 (1981) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") *Federal Election Comm'n*, 454 U.S. at 27 (the "consistency of an agency's reasoning" is a factor that bears upon the deference that is due).

all with the tendency to increase the cost of financing government debt." *Salomon Forex*, 8 F.3d at 974.

Thus, the plain language of the Treasury Amendment, the purpose underlying it, and the long-standing view of the Treasury Department construing it, all demonstrate that "transactions in foreign currency" reach beyond transactions in the commodity itself to include *all* transactions in which foreign currency is the subject matter, including options. Accordingly, all off-exchange "transactions in foreign currency," such as the foreign currency options at issue in this case, are exempted from regulation under the CEA.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

GARY D. STUMPP
Counsel of Record
ADAM M. BOND
STUMPP & BOND, LLP
61 Broadway, Suite 2216
New York, NY 10006
(212) 968-8600

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